GUIDELINES FOR THE PRACTICE OF MAINE ADMINISTRATIVE LAW

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INTRODUCTION

The Justice Action Group (JAG)[1] is concerned with issues pertaining to the public's access to justice with respect to Maine's State administrative agencies. These training materials were prepared by the JAG task force on administrative law, composed of individuals both within and outside of state government, which has been working since February 2000 to address how low-income residents of Maine deal with problems in administrative agencies. The Task Force has collected information concerning both the positive aspects of administrative agency practice and those practices that could be improved in order to remove barriers to justice that confront the public.

"Access to justice" in the administrative or governmental context refers not only to procedures to provide fairness in administrative hearings, but also to the ability of members of the public to obtain the information and assistance that is necessary to protect their legal rights, such as the ability to communicate with and access agency personnel when necessary to resolve questions.

These materials give guidance on the work of administrative agencies, first by reference to what is legally required, and then by reference to what process is "fair" in circumstances where it may not be clear what the law requires, but best practices can be ascertained. It is the view of the Task Force that the recommendations set forth below also are consistent with good management practices. To the extent that state government can achieve the goals of providing reasonable access to the public and conducting fair proceedings, time and resources which otherwise might be spent on responding to complaints and litigation from aggrieved persons will be saved.

The Task Force has recognized existing efforts of state agencies to provide prompt, helpful and accurate services[2]. Many state agencies are working very well with the public. JAG would like to encourage the replication of these successful strategies, so that all parts of state government meet their obligation to provide due process to all citizens.

I. Information about Agency Services or Benefits

A. Checklist for determining the public's ability to obtain necessary information

1. Is information about the agency's benefits, services, and procedures easily available to the public?
2. Is staff provided with instructions and guidance about interpretation of agency rules?
3. Is staff informed about related programs of other bureaus and departments as well as the ones they run?

4. Are the written materials about programs and benefits clear and easily understood?

    a. Have materials been cast in language and format for sixth grade reading levels and non-English proficient readers reading levels where appropriate?

    b. Are type faces and design clean and readable, i.e. font size at minimum 10 point?

5. Telephones:

    a. Is the number published? Is it included on all websites, forms, brochures, and other documents notifying the public about the service or benefit?

    b. Are there enough telephone lines so that callers get through without undue delay?

    c. Are there enough people to staff the phones?

    d. Have staff received training in telephone protocols?

    d. Do the people staffing the phones have the information they need to respond?

    e. Do the people staffing the phones have the information to refer callers to other bureaus and departments?

    f. Has a return call policy been established and clearly communicated to the staff?

6. Internet:

    a. Is the information presented in a way that is easily navigated by the public (e.g., with search features, obvious headings, cross-references)

    b. Are FAQ addressed?

    c. How is email tracked and is email responding policy clearly noted?

    d. Is there a policy for updating material and is posted material clearly dated?

    e. Has the agency identified a web-master and other resources for maintaining the web-site?

B. References to MAPA, title 5 of M.R.S.A.:

§8002	Definitions
§8051-A	Liaison between agency and public to provide information about agency rules
§8052	An agency may not adopt a rule unless it has complied with the notice, publication and hearing requirements of the APA
§8061	Style of rules and other materials should be plain and clear English, readily understood by the general public
§8064	An agency may not adopt a rule unless it has complied with the requirements for review by the legislature, where applicable

II. Applications for Agency Services or Benefits

Applications for agency services or benefits should be as clear and simple as possible to elicit essential information. A simple application form and process should maximize customer participation and satisfaction and reduce unnecessary time spent on information follow-up. Agency heads should conduct "usability testing" of their application forms.[3]

All applications should be processed as promptly as possible, within statutory or regulatory time limits. The agency should have written time limits for the processing and completion of applications. The agency should have sufficient staff to permit for prompt processing of applications. Verification requirements can be time-consuming and expensive for the client as well as the agency. Each agency should review its application procedures to reduce non-essential documentation requirements.

Agencies should maximize the public's online opportunities to request services or benefits and file applications or forms. (For example, some of the things that members of the public can currently do online are: purchase hunting and fishing licenses; renew vehicle registrations and professional licenses; file unemployment compensation appeals; and pay fines and state taxes.)

Agencies should affirmatively assist persons who are unable to navigate the administrative process on their own, such as persons with disabilities or limited English proficiency. Agencies that serve especially vulnerable populations should perform a thorough assessment of all aspects of their application process, to ensure maximum accessibility to program services and benefits. Front-line workers should be involved as much as possible in assessing the application process, since they are most familiar with existing application practices and are apt to know what works and what doesn't.

Agencies should invest in on-going training for front-line staff. This cannot be overemphasized. Making application changes without tandem organizational adjustments can lead to inefficient, inconsistent, and less effective program implementation.

Agency culture encompasses a shared vision and consensus about roles and responsibilities in achieving program goals. To truly influence front-line culture, agencies should provide training to front-line staff about general program missions and policies, as well as more task-specific training. Training can take the form of formal workshops, structured conferences, peer-to-peer mentoring, role-playing exercises, reference manuals and software, etc.

Changing front-line culture is often difficult to achieve, but rather than reinvent the wheel, agency managers can use "culture-changing prototypes" such as "The Culture Change Training Strategy Project Report," prepared by Mid-Atlantic Consulting Group for the U.S. Department of Health and Human Services.[4]

III. Notice of Agency Action

A. Who must receive notice?

Persons whose legal rights, duties or privileges are at issue must receive written notice of actual or prospective agency action. For example, an applicant for benefits or services administered by the agency, or an applicant for a license issued by the agency, must receive written notice of agency action. In any proceeding deemed by the agency to involve issues of substantial public interest, the agency must give notice to the general public by publication, at least twice in a newspaper of general circulation in the area of the State affected by the proceeding.

B. What is the nature of the notice required?

Agencies should look to state statutes and regulations for requirements of notice. The following are considered best practices:

- be written in clear and simple language, preferably at a sixth-grade reading level;
- explain the action taken or proposed to be taken by the agency;
- set forth the pertinent facts relied upon by the agency as reasons for its action;
- cite to, and preferably quote from, the pertinent portions of the statutes and regulations that support the action;
- inform affected persons of the right to dispute the agency's action;
- state in a clear, conspicuous manner the procedure for filing an appeal or a request for review of the administrative action; and
- state the manner and time period within which an interested person may seek a stay of the agency action.

C. What is the importance of timely notice?

Statutes and regulations contain specific requirements for timely notice in certain contexts. Even in the absence of specific statutory time limits, agencies should provide notice to interested persons and to the general public (in a proceeding of substantial public concern) in a sufficiently timely manner so as to allow persons to consider their options and take appropriate action. Persons affected by agency decisions need time to comprehend the decision, consult with counsel or others of their choice concerning the decision and its implications, make the decision whether or not to appeal the agency action and, once the decision is made, time to prepare the appeal documents.

Of course, administrative efficiency is important, but agency personnel need to remember that those affected by agency action may not have the ability to react immediately.

Persons outside of government need to acquire the requisite knowledge to respond to the agency, and they may have other pressing priorities. Agencies should not expect persons to respond in a matter of a few days to an action which has been under consideration of the agency level for weeks or even months.

D. What is the effect of a conditional approval?

Under Maine's Freedom of Access Law, 1 M.R.S.A. § 407, the conditional approval of an application or a license is treated, for notice purposes, as if it were a denial. The agency must make a written record of every decision involving a conditional approval, setting forth the reasons for its decision with written findings sufficient to apprise the applicant of the basis for the agency's decision. In other words, the same elements of notice set forth above in Section B apply to conditional approvals as they would to outright denials.

E. Notice of meetings of multi-member agencies

If a state board or agency consists of three or more individuals, the Freedom of Access Law requires that public notice be given of all of their meetings. This notice must be given in sufficient time so as to allow public attendance, and notice must be disseminated in a manner reasonably calculated to notify the general public of the meeting.

In the event that an emergency meeting of a multi-member board or agency is called, local representatives of the media must be notified of the meeting whenever practical.

F. Summary

In addition to the specific provisions of the of the Maine Administrative Procedure Act and the Freedom of Access Law, principles of good government require that there be a regular flow of information, without undue delay or barriers to communication, between agency personnel and those affected by agency actions. Notice should not be viewed as a burden, but rather as an opportunity for government to enhance public understanding and reduce the possibility of future litigation.

IV. Adjudication

A. Purpose of Adjudication - MAPA, 5 M.R.S.A. §9051 et seq

- Contest the initial agency decision;
- Protect the public from agency errors;
- It is required by statute or constitutional due process protection;
- It also provides agency management with a quality control mechanism.

B. Notice of Hearing

Hearing notices serve the important purpose of notifying the public of their procedural rights at the hearing. Hearing notices should inform people of their rights in a readable form. Hearing notices are required by the MAPA but they are a minimum. Best practice would provide as much information about the hearing process well in advance of the hearing. Pamphlets, videos, on-line information all should be considered in providing the accessible and comprehensive information.

Hearing notices should:

- State the time and place of the hearing;
- Clearly state the specific facts and the statutes or regulations supporting the action under review, to enable the person affected to prepare a defense to the action;
- State that parties may be represented by counsel, or other persons, at the hearing and inform the person affected of the address and phone number of free legal services that may be available to assist with a hearing;
- Allow sufficient time to prepare for the hearing, and state the manner by which a continuance may be requested;
- Inform the parties how to review or get copies of relevant agency files, records, or other documents;
- Inform the parties of the right to and the method for requesting subpoenas;
- Inform the parties of the right to present evidence and witnesses in support of the appeal, and the methods for doing so; and
- Inform the parties of the opportunity to request the sequestration of witnesses during the hearing.

C. Neutral Hearing Authority

An independent review of the initial decision requires that there be an impartial decision-maker. The decision maker title may be hearing officer, administrative hearing officer, commissioner, or administrative law judge. No matter the title the function is the same.

The hearing officer shall:

- Treat all parties with respect;
- Be unbiased;
- Not have a conflict of interest;
- Not engage in ex parte contacts with any party; and
- Not be subject to retaliation by the agency for exercising impartiality.
- Recognize that unrealistic quotas will undermine the quality of the hearing process and decision.
- Assist unrepresented parties to place favorable evidence into the record
- Assure that the record is complete with the necessary facts to reach a conclusion.

Agencies should ensure that their administrative hearing officers are qualified to hear and decide appeals. A legal background is preferred, and continuing legal training is necessary, to enable hearing officers to understand the elements and the importance of impartiality.

Adoption of a statewide code of ethics for administrative officers, such as the American bar Association Model Code of Judicial Conduct for State Administrative Law Judges, would provide a foundation for impartiality.

Some agencies use outside hearing officers to decide cases. This recognizes the value of separating them from the agency being reviewed. It also recognizes that hearing officers serve a special function that is must be developed by education, training and experience. This provides a powerful bulwark against inappropriate influences within the agency and sends an unmistakable message to the public that the decision-maker is independent of the agency.

D. Conduct of the Hearing

The MAPA sets the minimum standards for the conduct of the hearing. A properly trained hearing officer will assure these standards are met. The parties have the following rights.

- Right to present evidence and reasons to contest the agency action;
- Cross examination by the party of witnesses and to question documentation;
- Right to counsel;
- Timely hearing.

E. Settlements

Informal resolution should always be encouraged provided it is a completely voluntary process. Mediation should be available unless prohibited by statute.

Agency personnel should avoid over-reaching when attempting to resolve professional/occupational-licensing cases with *pro se* parties. Agency personnel should not encourage licensees to enter into legally binding administrative "consent agreements" without informing licensees of their right to counsel and without a reasonable basis for believing that the licensees are knowingly waiving their procedural rights.

F. Decision based on the Record

- The decision of the hearing officer must be based on the record.
- The hearing officer cannot rely on extra-record information.
- Both line staff and management must be educated on the absolute prohibition against ex parte contacts.
- The record shall consist of all evidence received or considered by the hearing officer in reaching a decision, including facts of which the hearing officer took Official Notice.
- The hearing officer will give the parties adequate notice whenever he or she relies upon Official Notice.

G. Timely Decision

Justice delayed is justice denied for many governmental benefits, permits and licenses. Final agency decisions should be promptly communicated to interested persons and to their representatives.

V. Final Decision

Agencies must view an appeal of a decision as a normal part of the process. An appeal review is quality control, not something to be afraid of. The goal in writing a final decision in a contested matter is to write the decision in a way that is clearly understood and will stand up in court.

The public has a right to understand why government does what it does to them.

If an agency decision is challenged in court, its reasons must have been stated coherently in the document.

Agency personnel may assist in understanding the decision and how to appeal a decision, but should not discourage persons from exercising their right to appeal or their right to consult with counsel.

A. Statutory Background

The Maine Administrative Procedure Act is the basic statutory guidance for adjudicatory proceedings. 5 M.R.S.A. §9061 of MAPA provides the legal basis for decisions.

> *Every agency decision made at the conclusion of an adjudicatory proceeding shall be in writing or stated in the record, and shall include findings of fact sufficient to apprise the parties and any interested member of the public of the basis for the decision. A copy of the decision shall be delivered or promptly mailed to each party to the proceeding or his representative of record. Written notice of the party's rights to review or appeal of the decision within the agency or review of the decision by the courts, as the case may be, and of the action required and the time within which such action must be taken in order to exercise the right of review or appeal, shall be given to each party with the decision.*
>
> *The agency shall maintain a record of the vote of each member of the agency with respect to the agency decision.*

Administrative agency findings of fact in adjudicatory proceedings serve the following purposes: to facilitate judicial review, avoid judicial usurpation of administrative functions, assure more careful administrative considerations, help parties plan cases for rehearing or judicial review, and keep agencies within their jurisdiction.[5]

The Administrative Procedure Act requires agency decisions made at the conclusion of adjudicatory proceeding to include findings of fact sufficient to apprise parties and any interested members of public of basis for decision. It does not require the agency to make detailed incident-by-incident fact-finding.[6]

Even though the agency is not obligated to include a complete factual record with its decision, it must include written statement of facts sufficient to show a rational basis for the decision.[7]

It is an indispensable prerequisite to effective judicial review that an administrative agency's decision set forth findings of basic fact as well as conclusions of ultimate fact and conclusions of law derived from those facts.[8]

A final decision should also notify parties of their right to appeal. *(For example, a psychologist who had been suspended from practice was entitled to an extension of time to bring an appeal to the Administrative Court, since she was never informed by written notice of her appeal rights, even though her attorney was aware of the psychologist's appeal rights.*[9] *_)*

B. Basics of a Decision

How does a hearing officer decide a case? First, he/she sorts out the facts and makes the findings that are relevant to the decision. Next, he/she determines and applies the legal standards to these facts. Third, he/she reaches legal conclusions on the issues. Lastly, he/she creates the ultimate judgment in the case. A hearing officer should:

- Find the facts important to the decision,
- Base the decision upon substantial evidence in the record (drawing reasonable inferences),
- Explain how the hearing officer came to his/her understanding of the facts, and
- State the conclusions that the hearing officer drew based upon the facts he/she found.

C. Writing Decisions

Each written decision should state the action taken, the factual reasons and the legal reasons for the agency's decision. Hearing officers should use common sense when writing decisions and apply judgment about what is important and needs emphasis. Minor points should be dealt with in a brief manner.

Decisions should be written in clear and simple language. It is not necessary for hearing officers to write like lawyers. Decisions should keep to the point and use simple and concise writing to explain the hearing officer's thinking. Repetition should be avoided.

A good decision is written so that someone who otherwise would have no idea what the case is about can understand it. The factual and legal basis for the agency's decisions should be specific enough so that the interested persons can understand the basis for the decision well enough to assess whether to appeal the agency action. .

A hearing officer should determine the conclusion before beginning to write. It is important for hearing officers to have a working knowledge of the law as a basis for applying and summarizing the relevant legal standards.

It is important to include findings of basic facts, as well as the ultimate conclusions of fact and law that form the basis for the decision. The decision should state the process that was used in reaching the decision and the facts used to justify the conclusion.

Every decision must contain a clear and simple statement explaining how the decision may be appealed to court and the time limits for dissatisfied persons to request review.

D. Format of a Decision

Formats may vary slightly, but the basic set up is as follows:

- An introduction;
- Issues presented;
- Listing of Exhibits;
- Findings of fact;
- Simple statement of the Decision;
- Conclusions of law (reasons for the decision);
- Record of vote (if appropriate);
- Sanctions (if appropriate);
- Appeal rights.

VI. POST DECISION - AGENCY ACTIONS

A. Adverse Appellate Decisions

When a state agency has obtained a favorable decision at an administrative hearing or a licensing board has issued a decision that was adverse to the licensee/applicant, the aggrieved party may appeal this decision to the appropriate appellate forum and the appellate court may decide against the agency or licensing board.

B. Agency Response

The agency or board must now decide how to respond to this adverse court decision.

1. Process:

- *Contact AAG assigned to state agency/board.* Under Maine law, a state agency or licensing board is represented by the Office of the Attorney General. The court's decision is an order that can be enforced by the successful party. An agency/board should promptly consult with the Assistant Attorney General assigned to advise that agency/board before responding to the court decision.

- *Review legal options with AAG*. The assigned AAG will review the various legal options available to the agency as a result of the court's decision. In many cases, there are several options open to the agency.

- *Discuss legal options and policy implications with Commissioner or Governor, as appropriate*. After legal consultation, most decisions implementing the appellate court's decision can be made at the level of the Bureau or Division Director. However, some decisions, such as the decision to appeal or to extend the rule of the case to others who are similarly situated to the successful party, may require consultation with and the approval of the Commissioner and, on occasion, the Governor's office. Often, the higher level of approval is required because the decision could require the expenditure of significant state funds, impact federal funding and/or result in adverse political implications.

- *Decisions that must be made in conjunction with Office of Attorney General*. A state agency or licensing board cannot appeal an adverse decision without the approval of the Office of the Attorney General. Likewise, if the response to the adverse court ruling that the state agency or licensing board proposes has the potential for further litigation against the State, such a response should only be pursued with the knowledge and approval of the Office of the Attorney General, which would represent the state agency/board in that litigation.

2. Analysis of Options:

Several factors must be examined before deciding how to respond to an adverse ruling.

a. Why did the court decide against the state agency/board?

If the court reviewing the administrative hearing decision does not agree with the decision, the appellate court can reverse it on a number of different grounds[10]:

- The hearing decision violates constitutional provisions. *(For example, the appellate court could find that the due process provided to the aggrieved party was inadequate.)*
- The decision violates statutory provisions because the agency:
    - lacked jurisdiction to hear the case, or
    - acted beyond its authority, or
    - misinterpreted statutory provisions, based on the plain meaning of the statutory language or as construed by the appellate court using traditional tools of statutory construction, such as legislative history, or
    - misapplied the statutory provision *(i.e. the agency or board correctly interpreted the statute but misapplied it to the facts of the case under review),* or
    - The agency decision was made using unlawful procedure, such as:
        - The rules upon which the decision was based were not properly promulgated in accordance with the requirements of the Administrative Procedures Act *(e.g., the rules were implemented before the Commissioner or Attorney General approved;,* or
        - The rules were not followed *(e.g., the rules provided for 30 days notice prior to a hearing and the aggrieved party only received 20 days;,* or
        - The hearing officer/board applied the wrong standard of proof/burden of proof *(e.g., the hearing officer put the burden of proof on the consumer to prove that the consumer was no longer entitled to benefits he/she had been receiving under a federal program, or the state agency was only held to the preponderance of evidence standard when clear and convincing evidence was required under federal regulations for cases involving fraudulent misrepresentation;,* or
        - The hearing officer's/board's decision was affected by bias *(e.g. during deliberations one of the board members commented that she had previous negative business dealings with the applicant's*

family and the member's statements clearly indicated that this influenced her decision to find against the applicant); or

- The hearing officer's/board's decision was affected by error of law; or
- The hearing officer's/board's decision was unsupported by substantial evidence on the whole record. On factual issues, the appellate court usually gives the fact finder a great deal of deference because he or she had the opportunity to observe the witnesses and assess their credibility. Consequently, the appellate court will only overturn the fact finder if the weight of the evidence compels another conclusion; or
- The hearing officer's/board's decision was an abuse of discretion and was arbitrary and capricious (*e.g. the agency had the discretion to apply a variety of sanctions in the case but chose to apply sanctions that were significantly out of proportion to the violation)*.

b. *What must the state agency/board do as a result of the adverse decision*?

1. General Considerations:

Once the basis for the adverse decision is identified, the agency/board must address the following issues:

i. Should the decision be appealed?

Some appeals are directly to the Maine Supreme Judicial Court and consequently the decision of the Law Court will be final in most cases. (Appeals to the United States Supreme Court are rare and would only involve constitutional matters or matters of federal law)**.** If the decision was made by a superior court, the decision can be appealed to the Maine Supreme Judicial Court. The Office of the Attorney General will only authorize the prosecution of appeals that have a likelihood of success and involve issues that could have a significant impact on the State's finances or its ability to carry out its programs. Since the review process at the Attorney General's office may take some time and the period to appeal the decision is generally 30 days from the date that the appellate court's decision is docketed, it is critical that the agency/board notify the Office of the Attorney General of the adverse decision immediately and initiate discussion to determine if there is a basis for the appeal.

On appeal, the Law Court will not give deference to the superior court's decision but will review the agency action anew. After review, the Court could affirm the lower court's decision, reverse it and reinstate the administrative decision, remand for a new hearing or reverse the decision in part and affirm it in part.

In some instances an appeal will not be the solution to the problem and other creative solutions must be considered.[11]

ii. Implementation of the decision regarding the person who was successful on appeal.

If the agency does not appeal the decision or there is no further opportunity for appeal, the agency/board will have to implement the appellate court's decision with regard to the successful party.

- Dicta. Not all statements made by the appellate court are the "rule of the case" and need to be implemented. Sometimes appellate courts will express disapproval or offer advice regarding certain aspects of the case but these opinions are not central to the decision reached on the case.[12]
- Are there instances in which no action is warranted? See Examples in End Note 4.[13]

iii. What must the agency/board do if the case is remanded?

The appellate court may remand the case simply to have the agency confirm the Court's decision to deny a permit or grant an application. On the other hand, the agency may need to take on a more active role, e.g., it may need to reopen the hearing so that the agency/board can apply the law or rules as interpreted by the appellate court or it may need to set up a whole new hearing so that the state agency or board can use the proper procedures. The appellate court can also remand the case back to the agency or board to take additional evidence and/or make additional findings of fact on an issue that was overlooked at the initial hearing. In the latter case, the agency/board will need to work with the other party and the hearing officer to reopen or schedule a new hearing in order to carry out the court's mandate.[14]

iv. What other action might be required?

As a result of the appellate court's decision, the state agency/board may be required to take immediate action without further hearing, such as:

- restore or grant the benefits to the successful party
- cease or modify collection activities
- grant the application, renew the license or remove restrictions

v. When should the decision be applied to others not involved in the appeal?

If the case is not a class action or the decision was not issued by the Law Court, it may not be necessary to apply the decision to other individuals. Applying the

decision to others similarly situated, even when the agency agrees with the appellate decision, may present some problems. For example if a state agency were to apply the decision to other similarly situated parties, this could invite federal sanctions for noncompliance with federal agency requirements. Presented with such a dilemma, state agencies could choose to advocate for an amendment to the federal agency requirements. If this is not successful or will not occur soon enough, agencies may need to reexamine existing law and regulations to determine if they have overlooked a method that can be used by the agency or administrative hearing officers to deviate from the federal requirements in cases of hardship.

Notwithstanding, there may be several reasons why it would be beneficial or advisable for the agency to apply the decision to others who are similarly situated.

2. Specific Considerations:

The following are instances when a state agency/board may decide to extend the decision beyond the individual who prevailed on the appeal.

i. Violation of constitutional provisions

If the appellate court has pointed out a deficiency in the due process afforded to the individual and it is the opinion of the Attorney General's office that the court's position is correct and further appeal is unwarranted, it would be prudent for the agency to change the practice, procedures and/or rules to address the constitutional demands and not wait until other lawsuits are initiated based on allegations that the State is violating the civil rights of individuals. Failure to act may impair the immunity that is otherwise afforded under the § 1983 of the Civil Rights Act. Although the cost of immediate compliance might appear to be a deterrent, the cost of further litigation and the potential for an adverse judgment against the State must also be considered.[15]

ii. Violation of statutory provisions

For similar reasons, the appellate decision that finds that the state agency/board violated statutory provisions may also prompt the state agency or board, to seek to change practice, procedures, rules to meet statutory demands as interpreted by the appellate court or seek an amendment to the statute to conform to the state agency/board's position on the issues involved.

iii. Made upon unlawful procedure

The appellate court decision that the agency/board acted upon unlawful procedure may prompt the agency/board to change procedures or amend rules.[16]

iv. Affected by bias

After the agency/board has held the new hearing on the case that was the subject of appeal, it should seriously consider advocating for training for hearing officers or board members on how to avoid conflicts of interest and issues of bias.

v. Affected by error of law

The agency will have to issue a new decision in compliance with the appellate court's interpretation of the law but should also consider training agency members on the correct interpretation and application of the law.[17]

vi. Unsupported by substantial evidence on the whole record

After the state agency has implemented the appellate court's decision with regard to the individual involved in the appeal, the agency should examine whether there has been a pattern of adverse decisions against the agency. The agency should also review how staff, in general, or the staff members involved in the unsuccessful case, assess their cases, gather evidence and document that evidence before reaching a decision; how the case is presented at the administrative hearing, and how the record is developed at the hearing by agency staff. If deficiencies in these areas are identified, either in general or with respect to specific staff members, the agency should provide training. The agency should consult with the Office of the Attorney General regarding the substance of the training. The Office can also assist in providing this training. Although the agency must be cautious to avoid ex parte communications regarding pending cases, it is helpful on occasion for agency supervisors to meet with staff of the hearings unit to discuss in general what can be done to improve the quality of the evidence and presentation of the agency's cases.

vii. Abuse of discretion/arbitrary and capricious

When the appellate court reverses on this basis, it may require the agency to provide a new hearing, but generally it will order the agency/board to take certain actions, such as, restoring or granting the benefits or the license, or removing restrictions. Since the reason for the adverse action may be based in part on the hearing officer's misunderstanding of a complicated law or rule or abuse of the discretion provided by statute or law, the state agency may want to advocate that hearing officer(s) receive additional training in specific areas, such as Maine Care or Support Enforcement laws and regulations.

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[1] Created in 1995, JAG provides leadership and coordination for the planning and delivery of civil legal assistance and functions as a public voice for the legal services community. It convenes task forces made up of volunteers from the provider community, the Maine Bar, and other concerned constituencies to consider specific problems in the availability of civil legal services and to develop solutions to those problems.

[2] At its November 2002 Access to Justice conference, JAG recognized the good telephone service of Department of Labor Customer Service Unit, the model application process of the Department of Human Services MaineCare, Healthy Maine Prescriptions and Cub Care programs, and the Website of the Judicial Department.

[3] For a description of usability testing process, see "*A Practical Guide to Useability Testing*" by Janice Redish and Joe Dumas, (Ablex Publishing Corp. 1993), or at least run them through a "Testing and Evaluation" checklist, such as the one recommended by the Practice Development Group: http://www.gopdg.com/plainlanguage/intro.html

[4] See Administration for Children and Families, HHS, Culture Change Training Strategy Project Report (Sept. 30, 1996). GPO Stock Number 017-092-00118-5.

[5] Public Advocate v. Public Utilities Commission, 655 A.2d 1251 (Me. 1995).

[6] Murphy v. Board of Environmental Protection, 615 A.2d 255 (Me. 1992).

[7] International Paper Company v. Board of Environmental Protection, 737 A.2d 1047 (Me. 1999).

[8] Gashgai v. Board of Registration in Medicine, 390 A.2d 1080 (Me. 1978).

[9] Seider v. Board of Examiners of Psychologists, 710 A.2d 890 (Me. 1998).

[10] 5 M.R.S.A. § 11007

[11] One example can be found in *Brooks v. Department of Human Services*, Docket No. AP-02-009. Androscoggin County Superior Court, filed February 21, 2003**.** In that case, the Department sought to enforce a 1996 decision that Mr. Brooks obtain health insurance for his minor child. Mr. Brooks sought a review of this decision, claiming that he could not afford to obtain this insurance even though it was available through his employer. The hearing officer upheld the Department's decision to enforce the 1996 decision, even though Mr. Brooks was already paying $41.00 per week in child support based on the statutory child support guidelines, the cost of the insurance would be $42.00 per week, and he qualified for Medicaid based on his low income. The appellate Court found that the hearing officer had abused his discretion in upholding the Department of Human Services decision to enforce the health insurance requirement under these circumstances. While this appeal was pending, the Federal statute applicable to child support enforcement activities was amended to deem insurance affordable if it was available through an employer, regardless of its cost. Under these circumstances, an appeal was not the solution, as it is likely that the Law Court would agree with the Superior Court's analysis that, prior to the statutory amendment, the hearing officer had abused his discretion.

[12] For example in the *Daly v. Board or Registration of Medicine* Docket No. AP-01-015, Oxford County Superior Court, July 18, 2002, the central issue on appeal was whether the Board should have issued a letter of guidance under Title 10. The Court determined that the letter of guidance needed to be withdrawn because it was inadequate, as it went beyond giving guidance and actually made some adverse findings against the licensee. Although the court could have stopped here, it also commented that the letter of complaint issued several months earlier did not notify the licensee of the standard of behavior that he was accused of violating. Did this mean that in the future, as a result of this court decision, the Board was required to include the standard that the licensee was alleged to have violated in all initial complaint letters to licensees? No. It was apparent that this statement was dicta, when the court explained that, if this letter had been a true letter of guidance, the omission of the standard in the earlier correspondence would have been considered harmless error. Although the agency is not required to implement the advice/suggestions contained in dicta, it should consider it seriously, as it may indicate the need to correct a fundamental problem in the procedures of the agency in order to avoid future litigation or appeals.

[13] In the *Conservation Law Found, Inc. v. Department of Environmental Protection*, Docket Nos. AP-98-45 & AP-98-95, Kennebec County Superior Court, January 28, 2002, the appeal challenged the validity of a rule upon which the agency issued a permit to build a dock. The superior court found the rule to be unlawful because it exceeded the rulemaking authority granted to the agency by the Legislature and it invalidated the permit. The court originally remanded the rule to the Board for rulemaking consistent with the decision but the rule had already been amended while the case was pending. The court therefore reconsidered that part of its decision and simply declared the version of the rule prior to the amendment to be unlawful. Under the circumstances, the agency was not legally compelled to make further amendments

to the rule since the amendment made while the case was pending at least arguably cured the legal defect identified by the Court. The Law Court is currently considering this case.

In another case, *Kimball v. Land Use Regulation Commission et al*., 2000 ME 20, neighbors appealed a Land Use Regulation Commission decision to permit a high-stakes bingo facility project by the Passamaquoddy Tribe to go forward. The courts (both Superior and Law) rejected the decision to give a permit to the Indian Tribe, because the property of the Indian Tribe technically did not qualify for the project under the Indian Land Claims Settlement Act. Since the permit was invalidated by the courts no further action, other than to confirm in writing to the Tribe that the permit was invalid, was required to implement the appellate courts' decisions.

[14] In *Maine People Organized to Win Environmental Rights v. Department of Environmental Protection*, Docket No. CV-89-246, Kennebec County Superior Court, Jan. 4, 1991, the Court agreed that the plaintiff, a citizen group, had not been given an opportunity to cross-examine witnesses on water quality issues during the public hearing on the expansion of a landfill in Norridgewock, contrary to the Maine Administrative Procedures Act. What happened was this: The Bureau of Environmental Protection (BEP) hearing had already concluded when further issues came to light that prompted the BEP to reopen the record to allow further written comments on water quality, with an opportunity for interested parties to respond in writing to those comments. The citizen group, Maine POWER, was not a formal intervenor in the proceeding (and had not requested such status), but had actively participated in the hearing as a member of the public. The Court concluded that the citizen group had been treated like and was in effect a formal intervenor, and hence a party entitled to cross-examine witnesses. When the case was remanded, the BEP conducted a further hearing in which the authors of the previously submitted written comments testified, and then were cross-examined by the citizen group. With the record thus enhanced, the BEP rendered another decision.

[15] In *Munjoy S. & A. Club v. Dow*, 2000 ME 141, the Law Court imposed a hearing requirement on the agency where the statutes did not expressly grant a non-profit organization seeking to conduct gaming the right to a hearing on the denial of an initial license application. Because it would have been extremely difficult to determine, based on this case, exactly when an organization would be entitled to such a hearing, and because the "wrong" decision could potentially expose the state to being sued for denial of due process (if a hearing were denied where it should have been offered), the statutes regarding beano and games of chance were changed to offer the right to request a hearing prior to the initial denial.

This case also influenced the conduct of the agency in another way. Pursuant to 317-A(2) (beano hall) and 343-A(2) (games of chance), a licensee whose license was being suspended or revoked by the Chief of the State Police had a right to request a hearing before the Commissioner of Public Safety or his designee. Those statutes provided that the "purpose of the hearing was to determine whether a preponderance of the evidence established that the ...licensee...violated a provision of this chapter...[or committed other disqualifying offenses]." The statute was silent on whether the applicant was entitled to a hearing on the sanction itself. However, because the Chief and Commissioner would exercise some discretion in imposing the sanction, based on *Munjoy*, the agency concluded, after consultation with its attorney, that the licensee was entitled to some input on the issue of sanctions as well.

[16] In *Hopkins v. Department of Human Services*, 2002 ME 129**,** although the court affirmed the agency decision under the circumstances of that case, the court stated that the notice procedures did not comply with state and federal requirements. Although the Court's statement can be considered dicta, in such a case the agency might consider it advisable to change the procedures regarding notice in order to avoid possible federal sanctions and further litigation alleging a deprivation of federal rights.

[17] In one instance, the state agency had annotated the Certified Nursing Assistant Registry because the CAN had falsified a nursing home patient's vital signs in a record. The registry can be annotated for substantiated instances of abuse. The hearing officer recommended that the annotation be removed but the Commissioner who was the final

decision maker determined that falsification of records was "abuse per se". The appellate court found that this interpretation was an error of law and reversed the commissioner's decision requiring the annotation to be removed from the Registry. The agency could at that point have considered amending the regulations to indicate that falsification of records was a form of "abuse."